80-1200

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

NO._____

* * * * * * * *

FRANK VERNON ROZA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

* * * * * * * *

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

* * * * * * * *

FRANK VERNON ROZA, JR.

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QUESTIONS PRESENTED FOR REVIEW

The issues presented to this Court are whether Title IX of the Organized Crime Patrol Act of 1970, known as the Racketeer Influenced and Corrupt Organizations Act (RICO), Title 18, U.S.C., §1961-1968, is unconstitutionally vague, overly broad and arbitrary and thus contrary to the United States Constitution Amendment 5, due process clause, and an unconstitutional expansion of federal jurisdiction.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

NO._____

FRANK VERNON ROZA, JR.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, FRANK VERNON ROZA, JR., respectfully prays that a Writ of Certiorari issue to reverse the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered October 23, 1980.

1. OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Ninth Circuit is set forth as Appendix "A" to this Petition.

2. JURISDICTION

The Judgment of the Court of Appeals was entered on October 23, 1980. The mandate was stayed pending petitioner's Petition for Rehearing which was denied on December 1, 1980. Petitioner's Application for Stay of Mandate filed on December 5, 1980 was denied on December 15, 1980. A copy of the denial of the Petition for Rehearing is attached hereto as Appendix "B" and a copy of the denial of the Application for Stay is attached hereto as Appendix "C". The jurisdiction of this Court was invoked under Title 28, United States Code, Section 1254(1).

3. QUESTIONS PRESENTED FOR REVIEW

The issues presented to this Court are whether Title IX

of the Organized Crime Patrol Act of 1970, known as the Racketeer Influenced and Corrupt Organizations Act (RICO), Title 18, U.S.C., §1961-1968, is unconstitutionally vague, overly broad and arbitrary and thus contrary to the United States Constitution Amendment 5, due process clause, and an unconstitutional expansion of federal jurisdiction.

4. STATEMENT OF THE CASE

This matter came before the United States Court of Appeals for the Ninth Circuit on appeal from a judgment of conviction entered on May 24, 1980 in the United States District Court for the Northern District of California, upon a jury verdict before the Honorable Stanley Weigel, judge presiding.

On March 13, 1979 the Federal Grand Jury for the Northern District of California handed down an Indictment charging appellant, Frank Vernon Roza, Jr., in Count 1 with a violation of Title 18, U.S.C., §1962(c) (racketering–RICO) along with his co-defendants Samuel Bailey and Robert Moore; in Count 2 with a violation of Title 18, U.S.C., §1962(a) (RICO); in Count 5 with a violation of Title 18, U.S.C., §2314 (Interstate Transportation of Stolen Property) along with his co-defendants Bailey, Moore and Lance Smith; in Counts 6 through 9 with a violation of Title 18, U.S.C., §2315 (receiving stolen property). In Counts 3 and 4 petitioner's co-defendants Bailey, Moore and Smith were charged with postal burglary (Title 18, U.S.C., §2115) and theft of government property (Title 18, U.S.C., §641).

Prior to trial, petitioner moved to dismiss the RICO counts and made a motion for severance which were denied by the District Court on May 3, 1979.

Jury trial began on May 15, 1980; on May 24, 1980 the jury returned verdicts finding petitioner and his co-defendants guilty of all charged counts and returned a special verdict forefeiting petitioner's 1978 Ferrari automobile.

On June 28, 1980, petitioner was sentenced to a total of fifteen years and fined $25,000.00. Petitioner was released on $300,000.00 bail.

Petitioner and his co-defendants filed timely appeals to the Court of Appeals for the Ninth Circuit which were consolidated. On October 23, 1980 the convictions of petitioner and his co-defendants were affirmed.

On November 6, 1980, petitioner filed a Petition for Rehearing to the United States Court of Appeals which was denied on December 1, 1980. Petitioner's Application for Stay of Mandate filed on December 5, 1980 was denied on December 15, 1980.

Petitioner was represented at trial and on appeal to the United States Court of Appeals for the Ninth Circuit by Ernest F. Winters.

5. STATEMENT OF FACTS

Petitioner was charged in Count 1 of the Indictment along with co-defendants Bailey and Moore with a violation of Title 18, U.S.C., § 1962(c) which states, inter alia:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . "

Petitioner alone was charged in Count 2 with a violation of Title 18, U.S.C., § 1962(a) which states, inter alia:

> "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . , to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . ."

Petitioner was charged in Counts 5 through 10 with the interstate transportation of stolen property (Title 18, U.S.C., § 2314) and receiving stolen property (Title 18, U.S.C., § 2315).

The co-defendants Moore, Bailey and Smith were separately charged with various postal burglaries and theft of government property (Title 18, U.S.C., § 2115 and 641).

The evidence produced at trial indicated that Bailey, Smith and Moore had burglarized several post offices for stamps. There was no evidence produced which involved the petitioner in any way with these burglaries.

William Eggars, an admitted burglar, participated in the post office burglaries with Bailey, Smith and Moore and was given immunity in exchange for his testimony at trial.

He testified that Bailey had met with Mr. Roza on several occasions and was told that Roza was the "fence" for the stolen stamp, however Eggars apparently was never a party to any conversations between Bailey and Roza, and therefore did not personally know the circumstances of the sale of the stamps.

The testimony of Joseph Escrove, an immunized government witness, constituted the bulk of the evidence incriminating Mr. Roza. Escrove was a San Francisco coin dealer who bought and sold stamps and coins. He testified that Mr. Roza was the sole owner of Consolidated Coin Company in Carson City and Reno, Nevada.

Escrove testified that he and Roza had an arrangement whereby Escrove provided Roza with blank signed checks that Roza could use when he needed money to buy coins and as loans between the two parties as friends. He stated that Roza would pay him back in silver coins and stamps.

He testified that Mr. Roza had told him that some of the stamps Roza gave him in repayment of these loans were received from burglars. Roza's defense was that Escrove had every reason to lie to save his own skin and that Roza had no knowledge of illegal source of the stamps and that at most he unknowingly received and processed stolen merchandise.

Stamps found in Mr. Roza's car after his arrest were not proven to be stolen nor linked to the alleged burglaries.

There was no evidence that Mr. Roza was involved in "organized crime," "the syndicate," "Mafia" or any organized crime families.

On May 24, 1980 the jury found petitioner guilty on all counts. On June 28, 1980 he was sentenced to a total of fifteen years with a $25,000.00 fine (Count 1 – 12 years and $25,000.00 fine, Count 2 – 12 years concurrent, Count 5 – three years consecutive to Count 1 and Counts 6 through 13 – three years concurrent with counts 1, 2 and 5).

6. ARGUMENT

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE CONVICTION OF PETITIONER FOR VIOLATIONS OF THE RICO STATUTE IS UNCONSTITUTIONAL AS THE STATUTE UPON WHICH HE WAS CONVICTED IS SO VAGUE AS TO VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND SO OVERLY BROAD AS TO BE SUSCEPTIBLE TO SWEEPING AND IMPROPER ARBITRARY AND UNREASONABLE APPLICATION: THERE IS CONFLICT OF THE DECISIONS OF THE COURT OF APPEALS INTERPRETING THIS STATUTE AND THIS COURT'S RULING IS NECESSARY TO SECURE CONFORMITY OF DECISIONS AND IMPORTANT QUESTIONS OF LAW ARE AT ISSUE HEREIN REQUIRING SETTLEMENT BY THIS COURT.

Attached hereto as Appendix "D" is a copy of the full text of Title IX of the Organized Crime Control Act of

1970 known as the Racketeer Influenced and Corrupt Organizations Act, hereinafter referred to as RICO, Title 18 U.S.C., §1961-1968. Petitioner has found no case in which this Court has rendered an opinion regarding the constitutionality of this statute.

A. Void For Vagueness:

RICO is the ninth of eleven titles of the Organized Crime Control Act of 1970. The purpose of the act was to "deal with the unlawful activities of those involved in organized crime" by "establishing new penal prohibitions and by enhanced sanctions and new remedies." (84 STAT 923; Defense of RICO Prosecutions by Barry Tarlow and Terrence Scott printed in the Criminal Law Seminar Syllabus, November 15, 1980, California Attorneys for Criminal Justice at p. 80).

The central provision of the Act is 18 U.S.C. §1962 which defines the RICO offense. The language used in §1962 is so broad, ambiguous and vague that it fails to give "a person of ordinary intelligence fair notice that the contemplated conduct is forbidden. United States v. Harris, 347 U.S. 612, 617 (1954) quoted in Palmer v. Euclid, 402 U.S. 544, 546 (1971).

Section 1962 reads, inter alia:

> "(a). It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income; in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities which affect, interstate or foreign commerce . . .
>
> "(c). It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ."
> (Emphasis added)

(1) Liberal Construction Clause:

Title IX includes a clause which authorizes and, in effect, directs broad judicial interpretations of the act by requiring liberal construction of RICO "to effectuate its remedial purposes" which, in and of itself, denies defendants a fair warning of the proscribed activities [See comment, Racketeering

Influenced and Corrupt Organizations (RICO) – Application of RICO in the Third Circuit, 24 Vill L. Rev. 263, 276 (1979), Defense of RICO Procecutions, Barry Tarlow, supra, at p. 146].

The complete text of the "Liberal Construction Clause" reads: "The provisions of this title [enacting this chapter and amending sections 1505, 2516 and 2517 of this title] shall be liberally construed to effectuate its remedial purposes." Title IX, §904(a) of Pub. L. 91-452.

While this liberal construction clause has been frequently cited by several courts in support of holdings which have significantly expanded RICO criminal liability [See United States v. Grzywaez, 603 F.2d 682, 686 n.6 (7th Cir. 1979, United States v. Huber, 603 F.2d 387, 394 (2nd Cir. 1979)] several courts have aptly pointed out that this clause is in direct contradiction to the mandate of this Court to resolve ambiguities in penal statutes in favor of leniency. See United States v. Mandel, 415 F.Supp. 997; 1022 (1976); United States v. Moeller, 402 F.Supp 49, 59 (1975); United States v. Altese, 542 F.2d 104, (2nd Cir. 1976) dissenting opinion at p. 107.

In Dunn v. United States, 99 S.Ct. 2190 (1979) this Court observed that the traditional rule of statutory construction requiring that criminal statutes be construed in favor of lenity was "rooted in fundamental principles of due process, which mandates that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."

Petitioner respectfully submits that §1962, despite its deceiving simplicity, is an extremely ambiguous and vague statute which, in light of the liberal construction clause, poses severe hazards to the unwary defendant. Indeed, there is significant conflict in the circuits in interpreting some of the essential language of the statute in deciding even the most fundamental question as to whom the statute applies.

(2) Vague And Ambiguous Language In The Statute:

One of the basic tenents of due process of law is that a penal statute gives clear warning of the activity which is to be proscribed.

The first area of unresolved confusion created by §1962 has been interpretation by the courts of the ambiguous words "any enterprise" in determining who is a proper defendant under the statute.

While the statute, as reflected in its popular name, appears to be aimed at investments of "dirty money" by organized crime figures infiltrating legitimate businesses it has been extended by several circuits far beyond that purpose.

The government has frequently alleged violations of §1962 based solely on illegal activities unrelated to the acquisition or operation of legitimate businesses. It argues

that §1962 applies to illegal operation of an illegal enterprise, that is, one or more persons committing two or more illegal acts as constituting an illegal criminal "enterprise," as well as the illegal operation of a legitimate one. Defendants have urged that RICO was intended to prohibit only the infiltration and operation of legitimate enterprises by organized crime through patterns of racketeering activity. They have contended that §1962(c) does not impose criminal liability on those involved in "an enterprise" composed of an individual or individuals connected only by their commission of two or more criminal acts. (See Defense of RICO Prosecutions, Barry Tarlow, supra, pp. 94-95.)

The majority of courts have rejected this argument and have refused to restrict §1962(c) to the illegal operation of a legitimate business. See United States v. Provenzano, 620 F.2d 985, 992 (3rd Cir. 1980); United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir.1980); United States v. Aleman, 609 F.2d 298, 304-0 (7th Cir. 1979). The First and Sixth Circuits have limited the term "enterprise" to legitimate entities. United States v. Turkett, _____F. 2d _____(1st Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) (en banc pending). The Eighth circuit has adopted a compromise position which permits an illegal "enterprise" but requires that the enterprise have a "formal" structure. See United States v. Anderson, _____F.2d_____, 27 Crim.L.Rep. (BNA) (9th Cir. 1980).

Thus depending on whether you are arrested in the First or Seventh Circuits you may or may not be a proper defendant under the Act.

When §1962 is applied to an "illegal enterprise," the enterprise is nothing more than an individual performing a "pattern of racketeering activity." The phrase "pattern of racketeering activity" is likewise vague. Section 1961(5) defines "pattern of racketeering" as requiring at least two acts of racketeering but is ambiguous as it does not define "pattern." It is simple to conceive of a defendant who has committed two acts of racketeering which can be characterized as "sporatic activity." The two acts could be widely separated in time from one another and from the date of the Indictment. (See defense of RICO Prosecutions, Tarlow, p. 110.) In United States v. Weisman, 624 F.2d 1118 (2nd Cir. 1980), the Court concluded that the term "pattern" did not require any relationship between the two acts. Thus, in come circuits, an individual who is charged with committing two sporatic, unrelated criminal acts may be held liable under the RICO statute.

A further ambiguity in §1962 involves the meaning of the word "acts." "It is unclear whether two prior racketeering convictions would be necessary. Conceivably, a

§ 1962(a) conviction could be based on two prior racketeering "acts" for which the defendant was never convicted. See Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970, 83 Yale L.J. 1491, 1500.

Indeed in United States v. Frumento, 563 F.2d 1083 (3rd Cir. 1977) the Court held that a defendant may be prosecuted in the federal court under RICO even where the defendants had been acquitted of the charged "criminal acts" in the state courts. In that case the Court rejected the defendant's claim of double jeopardy stating that the prosecution under RICO was s separate federal offense which is merely defined in terms of state crimes.

Under § 1962(a) the unqualified generality of the words "any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity" raises the issue of whether § 1962(a) extends to persons who did not commit any racketeering acts but who received money or other income from a racketeer and then use it in their businesses, with no intent to make the income of those businesses primarily available for further racketeering activity. See Investing Dirty Money, supra, Yale L.J. 1491, 1495.

"Consider, for example, the following situation: A racketeer gives money to a person who has not committed acts of racketeering and with whom the racketeer wishes to ingratiate himself, 'the money is an investment in the person's business, not a bribe. Would the innocent (non-racketeering) taker be a potential defendant under § 1962(a)? Since such a businessman has received income "indirectly" from a racketeering activity he arguably could be considered a defendant under the act'." Investing Dirty Money, supra, Yale L.J. at 1496. In light of the liberal construction clause the circuits most probably would extend such liability.

(3) Lack of Mens Rea;

The most serious ambiguity in the language of the statute—an ambiguity which raises additional difficult issues of statutory interpretation and which poses troubling questions about the compatibility of this statute with the American system of cirminal justice—is the apparent lack of a mens rea requirement (See Yale Law Journal, supra, at p. 1502). The most serious consequence of this omission is that a defendant could be convicted for investing or receiving tainted money without knowing that it is derived from racketeering activities (See Defense of RICO Prosecutions, Tarlow, supra, at p. 88).

Petitioner has found no case which has directly considered whether an intent requirement exists in the statute (see Defense of RICO Prosecutions, supra, at 89). Petitioner respectfully contends that in light of the ambiguous nature of

this statute and the extremely harsh and severe penalties imposed, this Court should require a mens rea element. See Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rv., 1097, 1109 (1952). See also United States v. United Gypsum Co., 98 S. Ct. 2864, 2876 n. 18 (1978). Petitioner contends that it is unfair and unconstitutional to impose the harsh RICO penalities in the absence of a scienter element and that the appropriate mens rea standard should be either knowledge that the money is derived from racketeering or a conscious desire to use such money.

B. The Statute Is Overly Broad

The concept of "overbreath" embodies the constitutional principle that the governmental purpose to control or prevent activities may not be achieved by means which sweep unnecessarily broadly and thereby invade areas of protected freedoms. Bambu Sales, Inc. v. Gibson, 474 F.Supp. 1297 (1979).

Both the concepts of vagueness and overbreath are grounded on the Due Process Clause of the United States Constitution. Bambu Sales, Inc. v. Gibson, supra, 1304. However, a statute may be found to be overly broad even where it is not vague. That is, the fact that an inactment provides adequate notice of the acts it prohibits does not absolve it of the vice of overbreath. Sawyer v. Sandstom, 615 F.2d 311 (5th Cir. 1980).

It is also well settled that the overbreath doctrine permits the invalidation of a statute or regulation even where the litigant challenging the regulation has engaged in no constitutionally protected activity. Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 100 S.Ct. 2343.

This Court has not hesitated to take into account possible applications of a statute in other factual contexts besides that at bar in determining whether a statute has an inhibitory effect upon constitutional rights. See NAACP v. Button, 371 U.S. 415 (1963).

In the matter before this Court there are two significant areas in which the RICO statute is susceptible of sweeping and improper application in violation of the United States Constitution. First, as interpreted with the "liberal construction clause," it may easily unconstitutionally extend federal jurisdiction into the realm of the state. Secondly, it may impermissibly reach the innocent recipient of "dirty money" and thereby inhibit the right of association, due process and fundamental principles of liberty, fairness and justice.

As previously discussed, several circuits have inter-

preted the "any enterprise" language of the RICO statute to include criminal "enterprises" i.e. the commission of two or more acts chargeable under the specified state or federal laws, relying upon the liberal construction clause previously referred to. A few courts, however, have commented that it would be a violation of the principles of the due process clause to follow Congress' apparent mandate to liberally construe the statute and abandon the traditional cannon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. United States v. Mandel, supra, at 1022. In this regard the Court in United States v. Moeller, supra, stated that: "More pertinent is the concern, grounded in principles of federalism, not to give federal criminal laws a broad construction that 'would alter sensitive federal-state relationships' or 'transform relatively minor state offenses into federal felonies'." citing Rewis v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); United States v. Five Gambling Devices, 346 U.S. 441, 74 S.Ct. 190, 98 L.Ed. 179 (1953).

In dessenting opinion in United States v. Altese, 542 F.2d 104 (2nd Cir. 1976) Judge Graafeiland aptly pointed out the dire consequences of the majority's broad interpretation of the RICO statute "on sensitive federal-state relationships and limited federal police resources and the resultant transformation of relatively minor state offenses into federal felonies by mere geographic happenstance." (citation omitted), supra at 108. The dissent went on to say: "The disruptive effect of our holding on federal-state relationships an on the limited enforcement and judicial resources of the federal government is every bit as great as that of the expansive interpretation of the Travel Act, 18 U.S.C. § 1952, condemned by the Supreme Court in Rewis v. United States, supra."

In United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), the Court indicated that RICO may be overbroad when applied to " 'small fry' " with only a tangential relationship to the criminal enterprise. See also Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. § 1961-1968: Broadest of the Federal Criminal Statutes, 695. Crim. L. & Criminology 1, 4 – RICO can be unconstitutionally vague as applied to some individuals).

Finally, petitioner contends that in light of the ambiguous language, which is being liberally and inconsistently interpreted by the courts, and the lack of any mens rea requirement, with the imposition of severe penalities, the statute may impermissibly reach one who unknowingly received "either directly or indirectly" money or income "or the proceeds of such income" which was originally racketeered money. Pet-

itioner respectfully contends that such an application could reach, at one point or another, every business in this country and would thereby impede the right of freedom of association and due process.

Although the ultimate purpose of the RICO statute, i.e. to curtail or eliminate organized crime, may be acceptable and even laudatory, the statute sweeps far too broadly and the broad judicial interpretation of the Act unconstitutionally subjects defendants to criminal sanctions without fair warning.

7. REASONS FOR GRANTING WRIT

The constitutional questions raised by petitioner concern the due process clause of the Fifth Amendment in prosecutions under the RICO Act which petitioner contends is vague, ambiguous and overly broad.

As indicated previously, it is petitioner's contention that his prosecution under that statute was unconstitutional and the Ninth Circuit Court of Appeals erred in affirming the denial of petitioner's motion to dismiss those charges.

Petitioner believes that this Court has never rendered an opinion on the constitutionality of the RICO statute, that the decisions of the circuit Court of Appeals are in conflict in the interpretation of this statute and that clarification of the constitutionality, scope and dimension of the Act in the instant case is an important question for the administration of criminal justice in the federal courts.

8. CONCLUSION

For all reasons given, Certiorari should be granted and the Judgment should be reversed.

DATED: DECEMBER 30, 1980

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, vs. SAMUEL GAYLE BAILEY, LANCE LOUIS SMITH, FRANK VERNON ROZA, JR., ROBERT GARY MOORE, Defendants-Appellants.	Nos. 79-1487 79-1491 79-1493 79-1518 MEMORANDUM D.C. No. CR-79-36-SAW

On Appeal from the United States District Court
for the Northern District of California
The Honorable Stanley A. Weigel, Presiding
Argued and submitted June 10, 1980

Before: ANDERSON and FARRIS, Circuit Judges, and RICHEY,* District Judge.

The defendants appeal their convictions on a multicount indictment for various crimes arising from a series of burglaries of United States Post Offices located at various locations in California and Washington. Bailey was convicted on separate counts of violations of 18 U.S.C. §1962(c) (racketeering), 18 U.S.C. §2115 (postal burglary), 18 U.S.C. §641 (theft of government property), and 18 U.S.C. §2314 (interstate transportation of stolen property). Smith was convicted on three counts of postal burglary, theft of government property, and interstate transportation of stolen property. Roza was convicted on two racketeering counts, two transportation of stolen property counts, and one count of receiving stolen property in violation of 18 U.S.C. §2315. Moore was convicted of racketeering, postal burglary, theft of government property, and transportation of stolen property.

We affirm.

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*The Honorable Mary Anne Richey, United States District Judge, District of Arizona, sitting by designation.

I.
CROSS-EXAMINATION OF WITNESS EGGERS

Bailey and Smith raise as potential error the limitation of the cross-examination of chief prosecution witness William Paul Eggers. The trial court did not allow defense counsel to question Eggers regarding certain specific crimes which he might have committed after he began to cooperate with the government in the prosecution which led to the present appeal. Cross-examination of Eggers revealed his unsavory character and his propensity for engaging in criminal activity. The defense attorneys were also allowed to explore possible deals which Eggers may have made with the government for lenient treatment in unrelated investigations.

The scope of cross-examinations is a matter committed to the sound discretion of the trial judge. E.g., Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980). In reviewing a refusal by a trial judge to allow cross-examination on impeachment matters, we look to see whether the jury had sufficient information to appraise the bias and motives of a witness. Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977), cert. denied, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed. 2d 392 (1978). Defendants here were afforded a sufficient opportunity to probe the bias of Eggers by inquiring into possible understandings with the government on specific charges. Viewing the cross-examination of Eggers as a whole, we observe that the defendants elicited a considerable amount of information which hardly placed the witness in a favorable light. We find that defendants conducted an effective cross-examination of Eggers and were not denied the right to confrontation.

II.
BRUTON VIOLATION

Smith, Roza, and Moore urge reversal of their convictions on the ground that the prosecution deliberately elicited testimony from the witness Namahoe which violated the rule of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Namahoe in substance testified to statements made by Bailey which arguably incriminated the other three defendants. The government concedes that Namahoe's testimony violated Bruton, but argues on appeal that the error was harmless beyond a reasonable doubt.[1]

While it is true that every Bruton violation does not require reversal, we may affirm a conviction potentially tainted by a Bruton error only if the evidence against the defendant is overwhelming and the prejudicial effect of a codefendant's admis-

sion is so insignificant by comparison that it is clear that admission of the statement was harmless beyond a reasonable doubt. See Parker v. Randolph, 442 U.S. 62, 70, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); United States v. Lutz, 621 F.2d 940, 947 (9th Cir. 1980). Our review of the record indicates that this standard was met as to each of the three objecting defendants. The testimony of witness Escove clearly implicated Roza as the fence for the stolen stamps, as did the presence of the stamps in Roza's Ferrari at the time of his arrest. The testimony of witness Eggers described in minute detail the involvement of Moore and Smith in the burglaries, and the tape-recorded telephone conversations corroborated much of Eggers' testimony. While questions of Eggers' credibility were raised, the jury resolved them in the government's favor.

The defendants, however, have raised an additional problem in connection with the Bruton error. It is clear from the record that the Assistant United States Attorney who examined Namahoe knew in advance that the witness would likely allude to statements by Bailey implicating the other defendants. It is also clear that the government has been instructed prior to Namahoe's testimony to confine the evidence only to statements made by Bailey which were admissible against him. The district court held a hearing out of the presence of the jury to determine whether the government had intentionally elicited the Bruton violative statements. Government counsel there conceded that he knew of the answer which Namahoe would likely give, and explained that he "was not thinking" and concentrating mainly on steering the witness away from giving testimony implicating the others in an alleged conspiracy to murder the witness Eggers. The trial court accepted counsel's explanation and struck all of Namahoe's testimony, while denying motions for a mistrial. The defendants argue that the government's knowing use of inadmissable evidence requires reversal under the principle of United States v. Whimpy, 531 F.2d 768 (5th Cir. 1976). The court below, however, accepted counsel's explanation that the use of the statement was inadvertent and occurred in the course of an effort to avoid the introduction of other inadmissible evidence. In the face of a clear finding by the trial court on counsel's state of mind, we are reluctant to second-guess counsel's motivations on appeal. While we admonish counsel to observe all instructions from the bench and to avoid scrupulously the use of inadmissible evidence, we do not find that government counsel's negligence here requires a reversal. The use of the evidence was not deliberate in the sense that the government hoped to sneak it past inattentive defense counsel.

III.
JOINDER AND SEVERANCE

Roza, Moore, and Smith argue that the trial court erred in refusing to grant their motions for severance. Smith challenges the original joinder under Fed. R. Crim. P. 8(b), and all three defendants challenge the failure to grant severance under Fed. R. Crim. P. 14.

A. Original Joinder under Rule 8(b)

Smith argues that his original joinder with the other defendants was improper under Rule 8(b) because he was the only defendant not charged under a RICO count and because a substantial amount of the evidence adduced at trial related to Roza's fencing operation.

Under Rule 8(b), joinder is permissible so long as all defendants participate in a series of acts constituting an offense or offenses, even through not all defendants participated in every act constituting each joined offense. United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971). The indictment here charged the defendants with an interrelated series of illegal acts of which Roza's fencing operation was an integral part. Furthermore, the evidence at trial indicated that each of the acts charged was a portion of an overall series of illegal transactions. We are satisfied that Smith's participation in the burglary operation was sufficiently related to other acts charged in the indictment to justify joinder under Rule 8(b). No error was committed here.

B. Severance Motions under Rule 14

Each defendant claims error in denial of their severance motions made at various stages of the proceedings. We can overturn the trial court's denial of a severance motion only if the prejudice resulting is of such magnitude that the defendant was denied a fair trial. See, e.g., United States v. Escalante, F.2d slip op. p. 2897 (April 29, 1980). We have examined the relevant portions of the record and have found no basis for overturning the trial court's rulings. Each of the defendants has received a fair trial. The court below did not abuse its discretion.

IV.
RICO COUNTS

Moore and Roza each week seek dismissal of the counts against them arising from alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq.

Moore challenges the constitutionality of the definitions of the word "enterprise" contained in § 1961 (4) and the phrase "pattern of racketeering activity" in § 1961 (5). Moore's argument, as is forthrightly conceded in his brief, is foreclosed by our decision in United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976).

Roza's claim that the statute does not apply to legitimate business enterprises is similarly foreclosed by prior decisions in this circuit. See United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. denied, U.S. , 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); United States v. Campanale, supra, at 364. Roza also contends that the evidence was insufficient to sustain a conviction under RICO. Roza's knowledge that the stamps were stolen and his activities as the gang's fence are well documented in the record.

We affirm each of the convictions under RICO.

V.
WARRANTLESS SEIZURE OF ROZA'S FERRARI

Roza challenges the constitutionality of the seizure of his Ferrari in the Sacramento hotel parking lot. The postal inspectors who arrested Roza impounded the automobile and later searched it pursuant to a search warrant. At the time that Roza was arrested, he was several hundred feet away from the automobile, and it was legally parked in a public lot. The inspectors impounded the car, acting upon the tip of informant Escove, who had been told by Roza that some $30,000 worth of stamps were located in the trunk.

This court upheld the warrantless search of an automobile under nearly identical circumstances in United States v. McClain, 531 F.2d 431 (9th Cir.), cert. denied, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976). Here, probable cause was provided by Escove's tip. Circumstances were sufficiently exigent in that an accomplice could well have moved the automobile or removed the stamps. The action of the inspectors in securing the automobile pending issuance of a search warrant was entirely proper.[2]

VI.
FORFEITURE OF THE FERRARI

The jury returned a verdict of forfeiture against Roza's Ferrari pursuant to 18 U.S.C. §1963(a)(1). The evidence showed that Consolidated Coin Company was the depository of funds which Roza had received from fencing the stolen stamps, and that the Ferrari was purchased with a $35,000 check drawn on Consolidated Coin's account. Roza challenges the sufficiency of this evidence to support a verdict of forfeiture. The evidence was sufficient to demonstrate that Consolidated Coin was an enterprise conducted in violation of RICO. Because the Ferrari was purchased with funds on deposit with Consolidated Coin, the jury could properly find that it was an asset of Consolidated Coin, even though purchased in the name of another. The evidence therefore was sufficient to support the jury's verdict of forfeiture.

VII.
LIMITATION ON CROSS-EXAMINATION OF THE WITNESS ESCOVE

Roza's claim that his ability to cross-examine the witness Joseph Escove was improperly limited is not supported by the record. Escove provided the names of several dealers to whom he had sold the stolen stamps before he announced his intention to name no others without an order from the court. The trial court sustained the prosecution's objection to further inquiry on relevancy grounds, but left the matter open for Roza's counsel to develop later in the trial. Counsel did not avail himself of the opportunity to reopen the issue. Roza's argument as to the possible relevancy of the testimony sought is speculative and contradicted by Escove's direct testimony which quite clearly indentified Roza as the source of the stolen postage stamps. The trial court's ruling on the Escove testimony was not in error.

VIII.
SUFFICIENCY OF THE EVIDENCE

Smith challenges the sufficiency of the evidence to support his conviction under count five of the indictment for causing the postage stamps stolen from the Martinez, California, post office to be transported in interstate commerce in violation of 18 U.S.C. §2314. Smith attacks the evidence on two grounds: (1) there is no evidence that Smith physically "caused" the stamps to be transported across state lines, and (2) there is no

evidence that Smith knew that the stamps were to be transported in interstate commerce.

Neither an intention to use interstate facilities nor knowledge that they will be used is an element of a §2314 offense. See, e.g., United States v. Masters, 456 F.2d 1060, 1061 (9th Cir. 1972). Smith's lack of knowledge that the stamps were to be transported across state lines is therefore irrelevant. The test for causation under §2314 is whether interstate transportation of stolen goods was a reasonably foreseeable consequence of the defendant's actions. Masters, supra.

The evidence showed that Smith aided in the transportation of the stamps from the scene of the burglary to Eggers' home in South Lake Tahoe. After unloading and inventorying the stamps, the defendants reloaded the stamps into Bailey's car, after being informed that Bailey intended to take them to his fence. The movement of the stolen stamps across state lines was thus a reasonably forseeable consequence of Smith's participation in the burglary and transporting of the stamps to South Lake Tahoe. Viewing the evidence in the light most favorable to the government, we cannot say that it was insufficient to convict Smith on count five of the indictment.

IX.
MERGER OF OFFENSES

Smith raises the issue whether his conviction for postal burglary under 18 U.S.C. §2115 merges into his conviction for theft of government property under 18 U.S.C. §641. We find that each statute describes a separate offense, and that each contains an element which the other does not. §2115 requires that forcible entry of a post office be proven; under §641, forcible entry need not necessarily be proven. §641 requires proof of theft while §2115 does not. See Clemas v. United States, 423 F.2d 461 (8th Cir.), cert. denied, 398 U.S. 968, 90 S.Ct. 2183, 26 L.Ed.2d 554 (1970). The Supreme Court reached a similar conclusion under a pair of older postal burglary and theft statutes. See Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915); see also Prince v. United States, 352 U.S. 322, 328, n.9, 77 S.Ct. 403, 1 L.Ed. 2d 370 (1957). It was not error to punish Smith for the separate violations.

X.
PRIOR CRIME EVIDENCE

We assume without deciding that the court erred in allowing Eggers to testify as to Smith's prior burglaries with Ed Witwick.

See Fed. R. Evid. 404(b). We agree with the government, however, that any error here was harmless beyond a reasonable doubt. The evidence of Smith's guilt was overwhelming, and the reference to the previous burglaries brief and general. The government did not refer to this evidence in its closing argument.

XI.
SANDSTROM VIOLATION

Finally, Smith asserts that the jury instruction on inferring intent violates the Supreme Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979). This court, however, has recently approved in a post-Sandstrom decision an instruction virtually identical to that challenged here. See United States v. Ross, F.2d , slip op. p. 3807 (9th Cir., June 19, 1980). The instruction did not amount to reversible error.

The judgment of the trial court and conviction of each of the defendants is

AFFIRMED.

FOOTNOTES

[1] For the purposes of this appeal, we assume that Namahoe's testimony constituted a denial of the defendants' right to confrontation, and that the error requires evaluation under the "beyond a reasonable doubt" standard. See United States v. Castillo, 615 F.2d 878 (9th Cir. 1980); United States v. Eaglin, 571 F.2d 1069 (9th Cir. 1977), cert. denied, 435 U.S. 906, 98 S.Ct. 1453, 55 L.Ed.2d 497 (1978).

[2] Cases cited by Roza are inapposite. United States v. Hellman, 556 F.2d 442 (9th Cir. 1977), involved a warrantless inventory search with no probable cause. Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970), was predicated upon a warrantless search following impoundment after all possible exigencies had been precluded.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRANK VERNON ROZA, JR., Defendant-Appellant.	No. 79-1493 ORDER

Before: ANDERSON and FARRIS, Circuit Judges, and RICHEY,* District Judge.

The Petition for rehearing of appellant Frank Vernon Roza, Jr., is DENIED.

*The Honorable Mary Anne Richey, United States District Judge, District of Arizona, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK VERNON ROZA. JR., Defendant-Appellant.	No. 79-1493 ORDER

Before: ANDERSON and FARRIS, Circuit Judges.

The application of Frank Vernon Roza, Jr., for stay of issuance of the mandate is DENIED.

APPENDIX D

CHAPTER 96–RACKETTER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.		Sec.	
1961.	Definitions	1965.	Venue and process.
1962.	Prohibited racketeering activities.	1966.	Expedition of actions.
1963.	Criminal penalties.	1967.	Evidence.
1964.	Civil remedies.	1968.	Civil investigative demand.

1970 Amendment. Pub. L. 91-452. Title IX §901(a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961-1968.

§1961. Definitions

As used in this chapter–

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indict-

able under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chaper. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465.

Amendment Effective October 1, 1979

Pub.L. 95-598, Title III, §314(g), Title IV, §402(a), Nov. 6, 1978, 92 Stat. 2677, 2682, provided that, effective Oct. 1, 1979, "fraud connected with a case under title 11" will be substituted for "bankruptcy fraud" in par. (1XD) of this section.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or

mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.
Added Pub.L. 91-452, Title IX §901(a), Oct. 15, 1970, Stat. 943.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.
Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat, 943.

§ 1965. Venue and process

(a) Any civil action or proceding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.

Legislative History. For legislative history and purpose of Pub.L. 91-452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Added Pub.L. 91-452, Title IX § 901(a), Oct. 15, 1970, 84 Stat. 944.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if de-

manded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) deliverying a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available forinspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations

which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand

to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provision of this section.

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 944.

Legislative History. For legislative history and purpose of Pub.L. 91-452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

No. 80-1200

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK VERNON ROZA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1200

FRANK VERNON ROZA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.*, is unconstitutionally vague and overbroad.

1. Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of investing in an enterprise the income derived from a pattern of racketeering activity, in violation of 18 U.S.C. 1962(a); five counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314; and one count of receiving stolen property that had been transported in interstate commerce, in violation of 18 U.S.C. 2315. Petitioner was sentenced to 15 years' imprisonment and fined $25,000. In addition, petitioner's coin business and a Ferrari automobile, which had been

involved in the racketeering offenses, were ordered to be forfeited to the United States under 18 U.S.C. 1963(a)(1). The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial showed that between January and August of 1978, petitioner's co-defendants burglarized three post offices in California and Washington, stealing more than $400,000 in stamps, food coupons, and currency. The same group also attempted unsuccessfully to commit burglaries at three other California post offices (RT 79, 893-896).[1] The stolen stamps were transported to Nevada where they were "fenced" by petitioner. Petitioner also "laundered" the proceeds of the sales of stolen stamps through one of his businesses, the Consolidated Coin Company of Carson City, Nevada. The scheme was detected when postal inspectors learned that postage stamps were being sold at a San Francisco stamp show at 15% below their face value (RT 81-85). The fencing operation was traced back to petitioner.

The government's case chiefly consisted of the testimony of William Eggers, who participated in all of the burglaries, and Joseph Escove, a San Francisco coin dealer who fenced stolen stamps that he received from petitioner. Their testimony was corroborated by a variety of documentary and physical evidence, and by tape recordings of conversations among the burglars that Eggers secretly made after he had agreed to cooperate with the government. The evidence against petitioner was further corroborated by the testimony of two other coin dealers, George Eggimann and Marcus Reaves, who had learned of petitioner's fencing operation. Petitioner knew about at least one of the burglaries in advance (RT 439-440), and he told Escove that the stolen

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[1] "RT" refers to the reporter's transcript of the trial. The citations herein to the record are taken from the government's brief in the court of appeals.

stamps were ordinarily received within 24 hours of the burglaries (RT 658). Petitioner purchased a Ferrari with a $35,000 check drawn on his Consolidated Coin Company account (RT 612-613), which was used to deposit funds obtained from fencing the stolen stamps (RT 640-646). When petitioner was arrested, a search of the Ferrari uncovered $29,000 in stolen stamps (RT 89-95, 106-111, 612-613).

2. Petitioner contends that his conviction on the two RICO counts should be set aside on the ground that the RICO statute is unconstitutionally vague and overbroad. At the outset, we note that petitioner failed to raise his claim in the lower courts, and thus it is not properly before the Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).[2] In any event, petitioner's claim is without merit.

Contrary to petitioner's assertion, the RICO statute is not unconstitutionally vague simply because the courts have differed in their interpretations of its precise scope. Indeed, every court of appeals to address the vagueness claim has rejected it. See *United States* v. *Aleman*, 609 F. 2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F. 2d 472, 479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Parness*, 503 F. 2d 430, 440-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). See also *United States* v. *Huber*, 603 F. 2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Cappetto*, 502 F. 2d 1351, 1357-1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

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[2]Petitioner's co-defendant, Robert G. Moore, raised the claim below, but the court of appeals rejected it (Pet. App. 5a).

Especially since the predicate acts of racketeering were themselves clearly illegal (see 18 U.S.C. (& Supp. III) 1961(1)), petitioner unquestionably had "fair warning * * * as to what conduct is criminal * * *" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) and was not "forced to speculate * * * whether his conduct [was] prohibited" (*Dunn* v. *United States*, 442 U.S. 100, 112 (1979)).

Similarly, petitioner's claim of overbreadth is insubstantial. Although RICO is necessarily encompassing in order to achieve its purpose of "eradicat[ing] organized crime in the United States * * *" (Pub. L. No. 91-452, 84 Stat. 923, 18 U.S.C. 1961 note), it does not implicate any constitutional right that could give rise to a colorable issue of overbreadth.

Finally, even if application of RICO were uncertain in some hypothetical situations, petitioner would have no ground for complaint in this case. The principle is firmly established that a person properly subject to the prohibitions of a statute may not escape punishment by contending that the statute is invalid as applied to others. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87 (1976); *Parker* v. *Levy*, 417 U.S. 733, 755-756, 759 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).[3]

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[3]~~Although it~~ is not raised in the question presented, petitioner's vagueness and overbreadth arguments advert (Pet. 7, 9-10) to the issue whether RICO is applicable to a wholly illegitimate enterprise. That issue is currently before the Court in *United States* v. *Turkette*, cert. granted, No. 80-808 (Jan. 26, 1981). Because the issue is not raised in the petition, and because in any event petitioner's legitimate business was used in his fencing operation, we believe that there is no need to hold the petition pending decision in *Turkette*. See *United States* v. *Sutton*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980) (en banc), slip op. 25-27, rev'g 605 F. 2d 260 (6th Cir. 1979), petitions for cert. pending, *Elkins* v. *United States*, No. 80-6058 (filed Jan. 19, 1981), *Hensley* v. *United States*, No. 80-6137 (filed Feb. 2, 1981), *Harris* v. *United States*, No. 80-6147 (filed Jan. 31, 1981), *Holmes* v. *United States*, No. 80-6253 (filed Feb. 27, 1981), *Adams* v. *United States*, No.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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80-6254 (filed Feb. 27, 1981), *Cravens* v. *United States*, No. 80-6272 (filed Mar. 2, 1981); *United States* v. *Zemek*, 634 F. 2d 1159, 1167 (9th Cir. 1980), cert. denied, *Carbone* v. *United States*, No. 80-900 (Feb. 23, 1981), and *Caliguri* v. *United States*, No. 80-6047 (Mar. 9, 1981), petitions for cert. pending, *Mazzuca* v. *United States*, No. 80-1517 (filed Mar. 6, 1981), *Williams* v. *United States*, No. 80-6307 (filed Mar. 7, 1981), *Janovich* v. *United States*, No. 80-6309 (filed Mar. 5, 1981); *United States* v. *Provenzano*, 620 F. 2d 985, 993 (3d Cir. 1980), cert. denied, No. 80-78 (Oct. 14, 1980). At all events, if the eventual decision in *Turkette* is believed to be of assistance to petitioner, he may seek appropriate relief at that time under 28 U.S.C. 2255 or Fed. R. Crim. P. 35.

DOJ-1981-03